



**Njagi v Republic (Criminal Appeal E025 of 2022)
[2025] KEHC 13413 (KLR) (30 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13413 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL APPEAL E025 OF 2022
EM MURIITHI, J
SEPTEMBER 30, 2025**

BETWEEN

AYUB MWANGI NJAGI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant being dissatisfied by the conviction and sentence in the Chief Magistrate Criminal Case number E155 of 2022, Kerugoya passed against him appeals against the whole judgment and sets forth the following grounds of appeal:
 1. The Learned Magistrate erred in law and fact by failing to comply fully with the proviso of Section 24 of the *Evidence Act*.
 2. The Learned Trial Magistrate erred in law and fact in failing to appreciate that the evidence adduced did not support the charge.
 3. The Learned Trial Magistrate erred by law and fact in failing to appreciate there were gaps and discrepancies in the evidence tendered by the prosecution.
 4. The learned Trial magistrate erred by law and fact in failing to appreciate that the charge was not supported by the medical evidence.
 5. The Learned Trial Magistrate erred by law and fact in relying on uncorroborated evidence.
 6. The Learned Trial Magistrate erred by law and fact in failing to appreciate that the conviction was against the weight of the evidence adduced.
 7. The Learned Trial Magistrate erred by law and fact in failing to consider the defence as tendered by the appellant.



8. The Learned Trial Magistrate erred in law and fact by shifting the burden of proof upon the appellant in this case.
9. That the sentence was manifestly harsh and excessive with regard being made to all circumstances.

Brief facts

Count 1

2. The accused herein Ayub Mwangi Njage is charged with Conspiracy to defraud Contrary to Section 317 of the penal code.
3. The particulars are that on 11.3.2022 at Kagumo township within Kirinyaga County the accused jointly with others not before court, conspired, with intent to defraud, by means of a phone call through cell Phone No. 0207xxx falsely pretending that you were a genuine Safaricom representative and that you were in a position to help Jedidah Muthoni Njeri withdraw airtel money and handover to you Ayub Mwangi Njagi a fact you knew to be false or untrue.

Count II

4. The accused is charged with stealing Contrary to Section 268 as read with Section 275 of the Penal Code.
5. Particulars are that on 11.3.2022 at Kagumo township the accused jointly with others not before court stole Kshs. 88,590/= the property of Jedidah Muthoni Njeri.
6. The prosecution called two witnesses. The accused gave an unsworn evidence in defence. On 7th December, 20220 the accused was convicted on the two counts. For each count was sentenced to serve three years in prison. Sentences to run concurrently.

Prosecution Case

7. PW1- Jedida Muthoni. She is a resident of Kagumo. She owns an Mpesa agent. The Mpesa is called Lucy Shop. On 29.3.2022 at around 11.00am the accused person came. He was talking on phone. He has been her customer for long. He asked her to talk to the person on the phone. It was from Safaricom customer care. The person on the other end introduced himself as Dancun. He instructed her to withdraw money for Ayub. He gave her a code. she was to send money to the code. She sent Kshs. 15,456, 37,900 to Eunice Simiyu. Kshs. 35,234 to the same Eunice Simiyu. All this time Dancun was threatening to cancel her Mpesa.
8. After sending the money she realized that the caller was not Safaricom. She secretly called the police. They came and arrested the accused. She had Mpesa statements. The code, given by Danson was making her send money from her number. The Mpesa statement is MFI 1. The accused person was using his phone. It is in court. It is MFI 3. The Mpesa statement for Lucy shop is MFI 2. The phone is labelled "S".
9. She had the accused person's phone where was sending money. She was able to see chats between accused and the other fraudsters. The 11 pages marked MFI 4. On cross examination by accused she stated that she had known him for 1 ½ years. She did not know his phone number. The money was not sent to his number. She was not under any influence when she sent the money. She talked to the person using the accused's phone. The other people were Eunice Simiyu and Danson.



10. On re-examination she said that she didn't know Eunice Simiyu. It is the accused who gave her his phone to talk to fraudsters.

PW2- Sgt. Thomas Langat

11. A Police Officer based at Kagumo Police station testified that on 11.3.2022 the complainant herein called his colleague, PC Kiama on phone. She said that somebody was at her Mpesa shop and that the person had given her his phone claiming that Safaricom customer care was calling. PW1 knew the accused. Through the accused persons phone she was instructed to transfer money to a Code. It was alleged that money had been sent to Airtel money. They went to the shop, found the accused at the shop and arrested him. They recovered a phone.
12. The phone was produced in court. They saw communication from face book. A lady called Grace was talking to the accused person. He was called through Airtel number. It was 0734-xxx. In his phone he had saved Safaricom customer care number as the contact name. This would dupe one into thinking that they were talking to Safaricom. They were able to steal Kshs. 88,590/= from PW1. The money was sent to Eunice Simiyu — 0728 -xxx.
13. They tried to track Eunice Simiyu. He saw Mpesa statements of PW1. The Mpesa statements of PW1 is exhibit No.1, Mpesa statement for Lucy Shop is exhibit 2, Neon phone is exhibit No.3, print outs from the phone is exhibit 4 and a small handwritten note is exhibit 5. On Cross examination by accused he said he knew the accused during arrest and his number is 0712-xxx. Eunice Simiyu is the one who received the money. The money was sent around midday. The accused facilitated the theft. The complainant was not in any way related to Eunice Simiyu.

Defence case

14. DW1- Ayub Mwangi Njagi. He gave an unsworn statement. He stated that he is from Kagumo. He was called on phone while at home. He was instructed to go to an Mpesa agent. He was called three times. He went to the complainant's Mpesa agent. He gave her his phone. It was ringing. The complainant talked to the people who were calling. After a short while police officers came. They said that he was a thief. He was handcuffed. At the police station he was informed that money had been stolen. He did not know how money was stolen. He went to the Mpesa agent alone. He did not know that money was sent to his account. He did not know what happened.

Appellant submissions

15. The appellant submits that the charge of conspiracy to defraud requires proof of an agreement between two or more persons to commit an unlawful act, coupled with an overt act and cited Republic v Yongo [2001] KLR 104, the High Court held that mere association does not amount to conspiracy.
16. The charge of stealing under Section 275 of the Penal Code also requires evidence of actual unlawful taking, without consent and with an intention to permanently deprive. They pointed to R v Isaac Theuri Gichungi [2015] eKLR, where the High Court overturned a conviction where theft was alleged but unsupported by any objective evidence.
17. There was no clear evidence proving that he had conspired to defraud and even whether the money was stolen by him. PW1 clearly states during cross examination that the money was not sent to him but to Eunice Simiyu.
18. On production of electronic evidence, the record is completely devoid of any such certificate. The phone was not examined by a forensic expert, and no certification was provided regarding the integrity



or chain of custody of the data allegedly extracted from it. The Court in *Republic v Barisa Wayu Matuguda* [2011] eKLR set the precedent that electronic evidence without certification under Section 106B is inadmissible, regardless of its apparent relevance. Justice Ibrahim (as he then was) held:

“Computer-generated evidence is only admissible if the conditions of Section 106B are satisfied. If not, the evidence is of no probative value and must be disregarded.”

19. The appellant submits that the alleged fraudster on the phone “Dancun” was never identified, summoned, nor charged. The recipient of the stolen money, Eunice Simiyu, was not investigated or produced in court to explain her role. No electronic money trail or mobile transaction records from service providers were tendered to link the me to the transfer or withdrawal of the money.
20. The entire case was premised on an assumption that the he knowingly facilitated a fraud by giving his phone to the complainant. There was no evidence showing prior communication or planning between the appellant and the actual beneficiaries of the alleged fraud. The trial court conflated mere presence with culpability.
21. Moreover, his unsworn defense that he merely handed over his ringing phone without knowledge of the caller’s intent was not challenged by prosecution through cross-examination or contradictory evidence. Yet the court dismissed it perfunctorily, contrary to Article 50(2)(k) of *the Constitution*, which guarantees an accused the right to adduce evidence and have it fairly considered.

Respondent submissions

22. They humbly submit there was agreement to defraud and cite *Rebecca Mwikali Nabutola & 2 others v Republic* [2016] eKLR, where NGENYE J. as she then was observed that an agreement may either be express or implied from the circumstances of the case.
23. The Respondent submits that Dancun who was disguising himself as Safaricom customer care person orchestrated a scheme and/or conspired with the appellant together with the recipient Eunice Simiyu who received the money to steal from him.
24. On stealing, the respondent was able to prove that the appellant conspired with Dancun the “Safaricom customer care contact” and Eunice Simiyu to steal Kshs. 88,590/= from Jedidah. Establishing whether violence was used is not a requirement as it was held in the case of *Katana Kitsao*, *infra*.

Issue for determination

25. Whether the respondent proved the essential ingredients of the offences of conspiracy to defraud and stealing, beyond reasonable doubt.

Analysis and determination

26. The role of the appellate court at first instance is well settled it was held in the case of *Okeno vs. Republic* (1977) EALR 32 and restated in *Mark Oiruri Mose vs. R* (2013) eKLR to reevaluate the evidence tendered before the trial court and come to its own independent conclusion of the matter bearing in mind that the trial court had the advantage of observing the demeanor of witnesses.



Whether the respondent proved the essential ingredients of the offences of conspiracy to defraud and stealing beyond reasonable doubt.

27. Section 317 of the Penal Code provides for the offence of conspiracy to defraud in the following terms:

“Any person who conspires with another by deceit or any fraudulent means to affect the market price of anything publicly sold, or to defraud the public or any person, whether a particular person or not, or to extort any property from any person, is guilty of a misdemeanour and is liable to imprisonment for three years.”

28. In order to prove an offence of conspiracy to defraud, the elements to be proved are the existence of an agreement and the intention to defraud.

29. PW1- she testified that the appellant came to her Mpesa shop He asked her to talk to the person on the phone. The call was allegedly from a Safaricom customer care. The person introduced himself as Dancun. Dancun instructed PW1 to withdraw money for the appellant. Dancun sent PW1 a code where she was to send money. PW1 sent a total of Kshs. 88,590/= from her mobile phone number 0207xxx to one Eunice Simiyu. Its shown in exhibit 1 & 2 which are the Mpesa statements which show this transaction. The complainant noticed the number 020xxx was saved as 0722xxx which is the usual Safaricom number.

30. Pw2- testified that Eunice Simiyu is the one who received the money. The money was sent around midday. The accused facilitated the theft. The complainant was not in any way related to Eunice Simiyu.

31. The offence of stealing has been defined under Section 268(1) of the Penal Code which provides that:

“A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.”

32. In the case of *Katana Kitsao v. Republic* [2003] eKLR (P.M. TUTUI COMMISSIONER OF ASSIZE) observed that “The main ingredient for a charge of stealing is “taking anything capable of being stolen fraudulently or without claim of right”. Nowhere is the use of violence of any degree or with an intention of accomplishing the mission incorporated.”

33. The appellant submits there was no clear evidence proving that he had conspired to defraud and even whether the money was stolen by him. PW1 clearly states during cross examination that the money was not send to him but to Eunice Simiyu.

34. There was no follow up on Eunice Simiyu to establish her participation in the offence or any agreement she had with the appellant to steal from PW1.

35. The respondent submits that the appellant conspired with Dancun the “Safaricom customer care contact” and Eunice Simiyu to steal Kshs. 88,590/= from Pw1.

36. However, the appellant submits that he did not receive the alleged stolen money.

37. In his statement he stated that he did not know how money was stolen. He went to the Mpesa agent alone. He did not know that money was sent to his account.



38. The respondent submits that there was a meeting of minds between the appellant, Dancun and Eunice. There was also a consensus to effect an unlawful purpose of stealing money from Jedidah. Moreover, from the evidence on record the unlawful act was also intentional.
39. On electronic evidence, the appellant submits that the respondent relied heavily on printouts allegedly extracted from the Appellant's mobile phone, including screenshots and messages purportedly linking him to the fraudulent scheme. These were admitted into evidence without a certificate of electronic authenticity, contrary to the strict requirements of Section 106B of the *Evidence Act*. The appellant submits that the trial magistrate assumed guilt based on unproven inferences, such as saving a number under the name "Safaricom Customer Care," without proving who placed the fraudulent call, who operated the receiving number, or whether he profited from the fraud.
40. Section 106B of the *Evidence Act* provides for admissibility of electronic on conditions set out in subsection (2) in the following terms:
- "106B. Admissibility of electronic records. (1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as "computer output") shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible."
41. The Court respectfully accepts the observation *Republic v Barisa Wayu Matuguda* [2011] eKLR that electronic evidence without certification under Section 106B is inadmissible; of no probative value and it must be disregarded.
42. In its judgment herein the trial court ruled on the evidence as follows:
- "7. In our instant case the complainant stated that the accused person presented his phone to her stating that Safaricom customer care wanted to talk to the person calling himself Dancun instructed her to withdraw money for the accused. On applying the code money in the sum of Kshs.88,590/= was transferred to one Eunice Simiyu. The complainant realized that the number saved as 0722-xxx was actually 020xxx. By saving it as 0722xxx the accused made it appear as the known Safaricom customer care number. I have seen exhibit No.4 particularly page 4. This is a grab of the accused person handsets screen shot. He is the one who had saved the number in his phone. In his unsworn statement he says that he was called by a stranger and told to go to Mpesa agent.
8. He does not explain the text messages in page one, where he. Was communicating with "Grace freemason" and getting instructions on which number to save. The call records show that the accused person was working together with the person calling himself Dancun of Safaricom and Eunice Simiyu the recipient. The net effect of their action was loss of money. It is thus proved that there was conspiracy to defraud as charged.



9. The evidence and analysis above clearly answers the second issue. The complainant through tricks employed by the accused and his accomplices lost KShs.88590/-
 10. The accused person is charged in the second count with stealing. He presented his phone and line to the complainant. It was used by the fraudsters posing as Safaricom personnel to steal money from the complainant. The money went to Eunice Simiyu. I did not believe the accused person when he said that he was called by a random number and instructed to go to an Mpesa agent. He did not strike me as that gullible.

He also did not explain why he saved the number in, a manner that would mislead people. I find that he is the one together with other who stole KShs.88,590.00 from the complainant as shown in the Mpesa statements.
 11. My findings above all lead me to 'the conclusion that the two counts are proved beyond reasonable doubt. The accused person is accordingly convicted as charged.'
43. The decision was clearly based on the computer Mpesa and WhatAspp messages printouts produced by the Investigating Officer PW2, without calling the maker of the printouts and producing a certificate under section 106B (2) of the *Evidence Act*, the Court ruling that "the call records show that the accused person was working together with the person calling himself Dancun of Safaricom and Eunice Simiyu the recipient".
 44. Section 106B (2) of the *Evidence Act* provides that electronic evidence is only admissible if it is accompanied by a certificate that:
 - i. Identifies the electronic device involved;
 - ii. Describes the manner in which the data was produced;
 - iii. States that the device was operating properly; and
 - iv. Is signed by a person occupying a responsible official position.
 45. It was also clear from the judgment that the trial court imposed the duty on the accused to prove his innocence by requiring him to explain how the number of the fraudster had been saved as Safaricom Customer Care on his phone. The duty to prove the guilt of an accused lies with the prosecution at all times. The accused could not properly be called upon to explain himself when the electronic records that could give a basis for admission of the evidence was not properly before the Court.

Conclusion

46. The evidence before the court did not establish the ingredients of conspiracy to defraud contrary to section 317 of the Penal Code an agreement and intent to defraud and stealing contrary to section 268 as read with 275 of the Penal Code. The trial court relied on electronic evidence from Mpesa and WhatsApp print-outs produced by the PW2 the Investigations Office compliance with, and consequently, whose authenticity had not been established in accordance with section 106B of the *Evidence Act*.
47. It is not the duty of an accused to prove his innocence, and could it be that the saving of the fraudster's number as Safaricom Customer Care was done without knowledge of the Accused? The electronic data of Mpesa and WhatsApp messages were not produced with the statutory cautionary requirements



of section 106B of the *Evidence Act*, say from the Safaricom mobile service provider and Mpesa officials or other suitable personnel to demonstrate the accuracy of the electronic data. There's no evidence of payment of the money to the Accused. Even if it were suspected that Accused and his accomplices would eventually get the money stolen from the Mpesa shop, suspicion is never sufficient proof for criminal conviction.

48. Proof of agreement in the conspiracy to defraud is lacking. It may be that the appellant was himself conned by the fraudster Duncan! There is no evidence of common purpose between the appellant and the caller Duncan, and the recipient of money, Esther Simiyu if she existed. The doubt is reasonable, given the absence of admissible evidence in the case and it is given to the benefit of the appellant accused.
49. There is also a reasonable doubt raised by the circumstances that the appellant who the trial court found not to be so gullible could have agreed to go and attempt to defraud the local MPESA shop operator to who he was well known as a customer, where he would easy to identify, trace and arrest for the offence.

Orders

50. Accordingly, for the reasons set out above, the Court finds that the appellant's appeal has merit and it is allowed.
51. The Conviction and sentence of appellant by the trial court for the offences of conspiracy to defraud contrary to section 317 of the Penal Code and stealing contrary to section 268 as read with 275 are respectively quashed and set aside.
52. The appellant is acquitted of the two offences of conspiracy to defraud contrary to section 317 of the Penal Code and stealing contrary to section 268 as read with 275 of the Penal Code.
53. The surety for the appellant's bail bond pending appeal is discharged and the security shall be restored to the depositor.

Orders accordingly.

DATED AND DELIVERED THIS 30TH DAY OF SEPTEMBER 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Munene for the Appellant.

Mr. Mamba for the DPP/respondent.

